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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,

Petitioners,

v.

SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Counterstatement of the Case

The petitioners would have this Court review through certiorari a decision of the Supreme Court of New Jersey holding simply upon the balancing of the numerous factors outlined by this Court in *Lemon* v. *Kurtzman*, 411 U.S. 192

(1973), that its declaration of invalidity of the New Jersey Emergency Transportation Tax (hereinafter ETT), N.J. S.A. 54:8A-1 *et seq.*, under the Privileges and Immunities Clause of the United States Constitution would not warrant refunds of ETT to the three named petitioners.* In seeking such further and extraordinary review of this discretionary fashioning of an equitable remedy and the concomitant determination to postpone the effective date of the ruling until January 1, 1984, to allow for the adoption of an alternative method for raising in excess of $30 million generated annually by the tax, petitioners continue to assert in dogged and unrelenting fashion the baseless contention that New Jersey's enforcement and defense of the ETT in the wake of the *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), ruling was unjustified and therefore warrants retrospective application of the declaration of invalidity. Yet, as the courts of New Jersey and this Court by its dismissal of petitioners' earlier appeal (449 U.S. 804) have recognized, the *Austin* ruling compels not a simplistic comparison of structural components of the ETT and the New Hampshire tax invalidated therein, but a painstaking analysis of the circumstances under which the allegedly discriminatory tax has been imposed and a calculation of whether the tax bears a "substantial relationship" to the evils which the tax has been enacted to correct. As demonstrated below and as articulated in the State's cross-petition for certiorari in this same action the ETT, contrary to the ruling of the New Jersey Supreme Court, should be held to survive this constitutional scrutiny. Accordingly, the State justifiably defended and relied on the validity of the tax throughout these proceedings and as a matter of

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* The total amount in issue as to these three petitioners is approximately $25,000 (Supplemental Brief for Defendant, Supreme Court of New Jersey at p. 6).

equitable discretion, the court below properly declined to give retrospective effect to its ruling. Yet, even, if as the Supreme Court of New Jersey has concluded, the tax as presently constituted is invalid under the Privileges and Immunities Clause, denial of the requests for refunds and postponement of the date of invalidity are warranted under the unique facts presented.

The critical elements of dissimiliarity between the emergency transportation tax in dispute in this litigation and the tax invalidated by the Court in *Austin* v. *New Hampshire*, can only be comprehended by a review of the complex factual record compiled before the trial court in both the initial and remand proceedings, the 1962 Agreement between New York and New Jersey respecting the taxation of interstate commuters and an appreciation of the uniqueness of the New York-New Jersey metropolitan area. Every weekday (and primarily during the peak hours of 7 to 10 a.m. and 4 to 6 p.m.) over seven million commuters traverse the Hudson River separating New Jersey from New York, 2,250,000 of these in northern New Jersey (App. B at 32a) (Pa 273) (T31-13 to 16).* The burden imposed upon transportation facilities in the northern New Jersey-New York City region by these vast numbers of commuters is exacerbated by the extraordinarily high population densities of the points of origin and destination for these commuting trips (Da**2 to Da10; Pa14-1) and the limited number of river crossings between the States. Although

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* This notation refers to the appendix to the brief filed by petitioners with the Supreme Court of New Jersey. The transcript reference is to the undated transcript of the remand proceedings in the Superior Court of New Jersey, Chancery Division.

** This notation refers to the appendix to the brief filed by respondent with the Supreme Court of New Jersey.

the number of New York commuters utilizing these transportation facilities is substantially smaller than the corresponding New Jersey interstate travelers, transportation experts have determined that these New Yorkers significantly exacerbate New Jersey's peak hour transportation problems and cause thereby the need for substantial expenditures for transportation facilities and transit subsidies (App. B at 34a to 41a; Db18 to Db20; Db46 to Db47; Db73 to Db81).

Since not all of the interstate routes and crossings nor all of the public transportation facilities are self-sustaining, New Jersey has been compelled to use general revenues to construct, maintain, and in the case of public transit, subsidize the transportation facilities in the northern part of the State. Yet because the New Jersey tax structure relies very heavily upon real property taxes, which are ordinarily paid only by residents, nonresidents who commute to New Jersey traditionally have not contributed substantially to State revenues despite deriving significant benefits from the New Jersey transportation system.

In 1961 and 1962, the New Jersey Legislature took cognizance of these tax inequities and of the pressing interstate transportation problem in the New York-northern New Jersey transportation area. The legislative means devised to generate the additional revenue needed to maintain and improve transportation facilities between New Jersey and New York was the Emergency Transportation Tax Act (N.J.S.A. 54:8A-1 *et seq.*) which is essentially a tax on individuals who use interstate transportation facilities.

Several aspects of the tax are worthy of note. Thus, the imposition of the tax was expressly made contingent upon the annual certification by the New Jersey Commissioner

of Transportation to the State Treasurer of the existence of a "critical transportation problem" in connection with transportation between this State and another state bordering thereon. N.J.S.A. 54:8A-5(c). And significantly, the Legislature mandated that all ETT revenues be paid into a special transportation fund. N.J.S.A. 54:8A-20. Other than the costs of administering the tax and of refunds to taxpayers, monies in the ETT fund are to be used exclusively to finance projects and programs designed to alleviate transportation problems between New Jersey and New York. (See N.J.S.A. 54:8A-20(a)(2)). The statute further provides that the ETT receipts may not be charged for expenditures except upon a presentation to the Attorney General itemizing the purposes for which the funds will be used, and the transmittal of such itemization to the State Treasurer "with a certification by the Attorney General endorsed thereon that the purposes for which funds are therein proposed to be used are within the terms and intent of the act . . ." N.J.S.A. 54:8A-20(b)(2). If any of the moneys in the transportation fund are not used for one of the purposes specified in the Act, a taxpayer has the right to a refund or credit equal to his pro rata share of the fund. N.J.SA. 54:8A-22.*

As explained by the Supreme Court of New Jersey in its initial opinion,** the tax as originally enacted applied only

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* An express exception to the above is provided in N.J.S.A. 54:8A-120, which directs that payments of ETT equivalent to amounts which New Yorkers would otherwise pay under New Jersey's Gross Income Tax Act (N.J.S.A. 54A:1-1 *et seq.*) be removed from the Transportation Fund, and pursuant to N.J.S.A. 54A:9-25 deposited in the Property Tax Relief Fund to which the gross income tax is dedicated. These funds are not in dispute in this action.

** A copy of this opinion is included in Appendix A to respondent's cross petition for a writ of certiorari seeking review of the Supreme Court of New Jersey's rulings as to the invalidity of the ETT under the Privileges and Immunities and Compact Clauses of the United States Constitution.

to New Jersey residents commuting to New York. The incidence of the tax was shifted to New Yorkers commuting to New Jersey when the State of New York repealed the nonresident credit in its personal income tax (theretofore available to New Jersey residents) which triggered the elimination of the reciprocal nonresident credit in the ETT. Under the subsequently enacted (and present) statutory scheme sanctioned by the 1962 Agreement entered into between the States of New York and New Jersey,* New Jerseyans' emergency transportation tax liability is offset by their payment of the New York personal income tax (N.J.S.A. 54:8A-16(b)) while New Yorkers receive a full credit against their New York personal income tax for payment of the emergency transportation tax. *New York Tax Law* §620(a) (McKinney).** The State of New Jersey from 1961 through the fiscal year ending June 30, 1980, in reliance on the Accord and the validity of the tax which generated $380,634,000 by that date (Db21) expended approximately $5.3 billion in the northern ten counties of New Jersey for its highway network and for railroad and

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* A more detailed discussion of the May 6, 1962 Accord concluded by Governors Rockefeller and Hughes appears in respondent's cross petition for writ of certiorari in this same action. The Accord appears at Appendix C to the cross petition.

** In all but a few instances (e.g. where New York real estate loses would effectively eliminate any New York tax on income earned in New Jersey) the credit reduces a New York resident's New York tax liability by the exact amount of emergency transportation tax paid. Accordingly, in the absence of an emergency transportation tax, the credit would have been eliminated, and a New Yorker's combined New Jersey and New York tax liability would have been precisely the same. The only difference, of course, is that the amount of the emergency transportation tax would have been payable to New York rather than New Jersey. Petitioners have admitted as much in this case (Da20).

bus subsidies (Db17).* Of this amount the State's expert Simpson & Curtin estimated (Db20) and the Supreme Court concluded (App. A at 14a) that approximately $182.9 million in State expenditures were allocable to New York commuters.

The present declaratory action ostensibly brought by three New York residents but actually pursued on behalf of officials of the State of New York (Da1) was not commenced until June 8, 1977, more than fifteen years after the enactment of the ETT and New York's express concurrence in the imposition of the tax (Pa1 to Pa4). Of course, then and now there was little financial incentive for individual taxpayers to bring such a challenge since no New Yorker paying the emergency transportation tax save in the rare circumstances (which do not pertain to any of petitioners herein) detailed *supra* suffered any economic harm by reason thereof.

The case proceeded, notwithstanding petitioners' suggestion to the contrary, in an expeditious fashion. Thus in response to petitioners' filing of a motion for summary judgment declaring the ETT unconstitutional under the Court's ruling in *Austin* v. *New Hampshire*, respondent alternatively moved to dismiss the complaint and for summary judgment.** At the return date of the cross mo-

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* This notation refers to the brief filed by respondents with the Supreme Court of New Jersey.

** The suggestion set forth in the petition for writ of certiorari that the aforementioned motions and an earlier motion to dismiss (on exhaustion grounds) filed in September 1977 were frivolous and filed as dilatory measures is unjustified and offensive. Each one of these motions had a substantial basis in State law (see respondent's brief filed with the Supreme Court of New Jersey in the initial proceeding at pp. 1-2, 38, 44-46 and respondent's brief filed with the Supreme Court of New Jersey after remand at p. 47) and was filed by the respondent based upon his belief that his position on the merits would be furthered if the motion was granted.

tions in December 1977 petitioners insisted upon the right to take the depositions of the persons whose affidavits had been submitted in support of the motion for summary judgment (Transcript of December 15, 1977 hearing, at T4-6 to T5-3). This resulted in the taking of more than 550 pages of depositions as well as the introduction of hundreds of pages of exhibits in connection with those depositions (Ppa50 to Ppa100, Ppa120 to Ppa131).* The matter was then brought back before the trial court, first in February and then in March 1978, at which time there was further controversy concerning the parameters of the record (Ppa145 to Ppa149, Dda45 to Dda59).*

On October 24, 1978 the trial court issued a comprehensive opinion upholding the constitutionality of the ETT, wholly rejecting petitioners' contention that *Austin* v. *New Hampshire* compelled a contrary result. Thus, the trial court noted:

> Nothing in *Austin* indicates any reason for the enactment of the New Hampshire statute other than to raise general revenue. The statute before this Court dedicates the use of the revenues collected under the Act to the Transportation Fund. There is no indication of dedication in *Austin*. The purpose of the New Jersey Act is the alleviation of the commuter problem. Thus, a direct benefit is intended to New York commuters such as Salorio [Cr. Pet. App. B at 53a].**

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* These notations refer to the appendix to the briefs filed by petitioners and respondents in the initial proceedings before the Supreme Court of New Jersey which was stipulated as part of the record in the remand proceedings (App. B at 25).

** This notation refers to the Appendix to the State's cross petition for a writ of certiorari in this same action.

The trial court further found that, assuming the tax "is administered in accordance with the express purposes" declared therein, New York commuters "will receive a direct benefit from the expenditure of the funds" (Cr. Pet. App. B at 51a). It further concluded that

> . . . the transportation problem is substantial and the ultimate impact of the tax upon residents and non-residents bears a close relation to the challenge of correcting the traffic and commuting problems [Cr. Pet. App. B at 54a].

Based upon these factual findings, the trial judge concluded that the petitioners had failed to demonstrate that the ETT violates the United States Constitution [Cr. Pet. App. B at 56a].

The trial court also determined that the ETT and its companion legislation in New York had been enacted and remained in effect pursuant to a reciprocal agreement entered into between the States, consistent with the principles of interstate comity embodied in the Privileges and Immunities Clause of Article IV (Cr. Pet. App. B at 55a). Finally, the trial court upheld the tax under the Equal Protection Clause of the Fourteenth Amendment, reasoning that the State was not required to demonstrate a compelling state interest and that the tax bore a "reasonable relation to a proper governmental purpose" (Cr. Pet. App. B at 54a).

Upon direct certification to review the judgment of the trial court,* the Supreme Court of New Jersey affirmed the trial court's equal protection ruling (Cr. Pet. App. A

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* Pursuant to N.J. Ct. R. 2:12-2 the Supreme Court of New Jersey may directly certify an appeal pending unheard in the Superior Court of New Jersey, Appellate Division.

at 35a). The court further concurred with the State's arguments and the trial court ruling that as a matter of law the costs concurred in alleviating transportation problems created by New Yorkers commuting to New Jersey would serve as a "valid independent justification" for the ETT (Cr. Pet. App. A at 21a). However, it concluded that the trial court had erred in its determination that the 1962 agreement between New York and New Jersey was an enforceable reciprocal agreement sufficient to support the constitutionality of the ETT under the Compact and Privileges and Immunities Clauses of the United States Constitution (Cr. Pet. App. A at 30a). The court further held that the trial court had acted improvidently in deciding the Privileges and Immunities issue on cross-motions for summary judgment (i.e. identifying the extent to which the New Jersey commuter constituted "a peculiar source" of the New Jersey transportation crisis and concluding that the tax levied on the New York commuter bore a "substantial relationship" to costs expended by New Jersey in alleviating the crisis) (Cr. Pet. App. A at 36a). Finding the record inadequate to decide these factual questions, the court ordered a remand

> . . . to permit a full exploration of the benefits and burdens to non-residential commuters occasioned by State transportation programs and imposition of the ETT [Cr. Pet. App. A at 26a].

In providing guidelines for further trial proceedings, the Supreme Court of New Jersey directed:

> On remand, evidence should be introduced to enable the trial court to compare the transportation benefits New York residents receive and the tax contributions they are required to make. The data must, therefore, include statistics on annual state and local expenditures—identified by source—for commuter

> rail and bus service and for construction and maintenance of highways used by interstate commuters. Figures on the amount and application of ETT monies must also be introduced for the years during which non-residents paid emergency transportation taxes [Cr. Pet. App. A at 26a to 27a].

Although the opinion of the Supreme Court of New Jersey was squarely based on the principles set forth in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978) and *Toomer* v. *Witsell*, 334 U.S. 385 (1948), petitioners chose to press their claim that the *Austin* v. *New Hampshire* ruling compelled a summary invalidation of the ETT and filed a Notice of Appeal with this Court on June 19, 1980 from those portions of the Supreme Court of New Jersey's opinion affirming the constitutionality of the emergency transportation tax and remanding the case for further proceedings. On July 24, 1980, the State filed a motion to dismiss on the grounds of lack of finality of the Supreme Court of New Jersey's remand opinion and on the same date filed a cross-petition for a writ of certiorari as to that portion of the Supreme Court of New Jersey's decision declaring the 1962 Agreement between New York and New Jersey unenforceable and thus an insufficient basis for upholding the ETT against the Privileges and Immunities challenge. On October 6, 1980 this Court dismissed petitioners' appeal and denied the State's cross-petition.

In the remand hearing conducted in May 1981 respondent with the assistance of experts in the transportation field adduced extensive evidence on the exact nature of the transportation problem, the extent to which New York commuters contribute to it, the benefits they derive from New Jersey's expenditures for transportation facilities, and net ETT collections over the twenty-year history of the tax

(App. B at 34a to 53a). Petitioners countered with expert opinion purporting to refute the State's evidence (App. B at 28a, 40a, 43a to 49a). Upon the conclusion of the five day hearing the trial court in an opinion issued on October 9, 1981, upheld the constitutionality of the ETT under the Privileges and Immunities Clause (App. B at 53a to 54a). In so doing, the trial court accepted as persuasive virtually all the State's evidence and based its findings almost exclusively on the reports and testimony of the State's experts. Thus the court agreed with the State's expert Simpson & Curtin that commuter demand is the primary cause of New Jersey's transportation problem, both as to highway and transit facilities (App. B at 30a to 33a). The court further accepted the commutation figures presented in the Simpson & Curtin report pointing out, as required by the Supreme Court, the relative numbers of New York to New Jersey and New Jersey to New York commuters during the period under review. With the exception of the allocation of highway maintenance expenditures to the commuting population, (see App. B at 51a to 52a), the trial court also adopted the allocation of costs to New York highway, bus and rail commuters developed by Simpson & Curtin and in so doing rejected petitioners' proposed incremental analysis of allowable transportation expenditures (App. B at 47a). On this basis, the trial court concluded that $182.9 million of State transportation expenditures were properly allocable to the New York commuters who had paid a total of $380 million over the twenty-year history of the ETT (App. B at 36a).

While these allocable costs alone would not justify more than approximately 50% of the total amount of tax imposed upon New York commuters, the trial court did find that the benefits calculated by the State's experts to have been derived by New York commuters from these expendi-

tures* were commensurate with the ETT imposed upon them (App. B at 53a to 54a). The trial court thus concluded that the State had established that the ETT was not violative of the Privileges and Immunities Clause because New York commuters are a peculiar source of the critical transportation problem in the New York-New Jersey metropolitan area (App. B at 54a) and the burden of the ETT on New York commuters is substantially commensurate with the benefits they derive from New Jersey's transportation facilities (App. B at 53a to 54a).

Judgment in favor of the State was entered on October 26, 1981 (Pa47 to Pa48, Pa46) and on November 6, 1981, petitioners filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division (Pa49 to Pa51). Petitioners, following the filing of all parties' briefs, moved for direct certification of the appeal pending unheard in the Appellate Division which motion was granted by the Supreme Court of New Jersey on April 27, 1982. 91 N. J. 182, —— A.2d —— (1982). In a decision issued on June 8, 1983, the Supreme Court of New Jersey, reversing the trial court, concluded that the ETT (as presently constituted) could not survive petitioners' challenge under the Privileges and Immunities Clause in that the State had failed to establish that the costs incurred by New Jersey as a result of New York commuters' exacerbation of New Jersey's peak hour transportation problems ($182,973,042) bore a "substantial relationship" to the tax imposed on these commuters ($381 million) (App. A at 13a

* These benefits consist of savings in time and user costs attributable primarily to new highway construction and widening, highway resurfacing, operational improvements, safety improvements, maintenance and drainage, and, in the transit area, savings in time and costs (Db20 to Db29; App. B at 44a to 54a).

to 14a).* Nevertheless, in view of the State's "justifiable reliance" upon the ETT as a source of revenue, and the reciprocal tax crediting arrangement made with New York in 1962, the absence of any application by petitioners or other taxpayers for interim injunctive relief during the pendency of the action as well as the fiscal chaos which would result should it be required to refund the ETT as compared to the absence of any financial harm suffered by petitioners by reason of the collection of the ETT, the court concluded, as a matter of its discretion, that no refunds would be ordered (App. A at 16a to 20a). For these reasons, and because the State had established the validity of approximately 50% of the annual taxes collected from New York commuters, the court postponed the effective date of its decision for six months hence (until January 1, 1984) to provide an opportunity for the New Jersey Legislature and executive branch to devise an alternative source of revenue to meet the costs incurred in alleviating the transportation burdens imposed by New York commuters (App. A at 20a to 22a).

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* In so ruling the Court rejected the trial court's acceptance of the State's experts' calculation of benefits derived from these costs, finding that a misunderstanding had resulted from the repeated references in the Supreme Court of New Jersey's initial opinion to such benefits (App. A. at 11a). Rather than directing an admeasurement of "benefits" on remand, the Court stated it had intended that a record be created on the "costs of those benefits" (*Ibid.* n.9).

ARGUMENT

In denying retrospective effect to its ruling invalidating the Emergency Transportation Tax, the Supreme Court of New Jersey properly exercised its discretion as empowered by the Court's ruling in *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973).

By this petition the named New York commuters seek to overturn the decision of the Supreme Court of New Jersey, denying their right to recapture from New Jersey any taxes paid by them under the Emergency Transportation Tax Act.* In asserting this claim for relief petitioners proceed upon the theory that once *Austin* v. *New Hampshire* was decided, the invalidity of the ETT was incontrovertible and New Jersey could not in good faith have collected or defended the validity of the tax. They therefore conclude that the Supreme Court of New Jersey erred in finding the State's reliance upon the constitutionality of the

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* The claims of the petitioners in total are in excess of $25,000. Identical claims for relief for all ETT monies collected by the State have also been sought in a pending and as yet uncertified class action suit filed on April 14, 1978 in the Superior Court of New Jersey, Chancery Division, (*Yowell* v. *Glaser*) (Docket No. C-2190-77), which has been stayed pending a final determination in this action (App. A at 16a). Additionally, there are pending within the New Jersey Division of Taxation an undetermined number of claims for refunds of ETT and in the Tax Court of New Jersey ten suits appealing the denial of ETT refund claims. The potential recovery under all these claims amounts to approximately $500 million—a significant percentage of the State's $6.1 billion budget (see P.L. 1982 c. 49 at 482). If limited to the amounts collected from the date of the *Austin* v. *New Hampshire* ruling, the refund sought would be in excess of $260 million, the loss of which have would a devastating effect on the State's fisc (see Supplemental Brief of Respondents, Supreme Court of New Jersey at pp. 6-7).

tax justifiable and a factor thus warranting prospective invalidation of the tax alone. Such a theory of mandatory retrospective invalidity is predicated upon a fundamental misconception of the applicable law and ignores as well the compelling equitable factors which justify the denial of any monetary recovery from New Jersey.

While this Court initially espoused the common law doctrine that an invalidated statute must be deemed a nullity from the moment of its adoption (". . . in legal contemplation as inoperative as though it had never been passed" *Norton* v. *Shelton County*, 118 U.S. 425, 442 (1886)), the rigidity of the rule and the impractical and harsh results which it compelled in invalidating all past transactions made in reliance upon a purportedly legitimate statute led the Court in *Chicot Co. Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940), to reason that the "broad statements" of absolute retrospective invalidity espoused in *Norton* were unjustified:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

The deathknell of the *Norton* doctrine was sounded in *Lemon* v. *Kurtzman*, 411 U.S. 192, 199 (1973) (*Lemon* II).* There Chief Justice Burger, in the plurality opinion of the Court, concluded that the Court's abandonment of the doctrine was compelled by the "recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." Where the government's evaluation of the constitutionality of a legislative enactment is made in good faith and is reaffirmed upon initial judicial review, *Lemon* II instructs that the expenditure of public monies pursuant to the later invalidated statute should not be overturned. *Id.* at 207-209.

In so ruling the Court rejected the position of the plaintiffs that the Court's 1971 invalidation of a Pennsylvania statutory program to reimburse nonpublic sectarian schools

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* The implicit rejection of the *Norton* doctrine and concomitant adoption of an equitable analysis in determining questions as to the appropriateness of retroactive invalidation of challenged statutes was evident in several decisions issued prior to *Lemon*. See *Allen* v. *Bd. Elections*, 393 U.S. 544 (1969) (State's failure to obtain federal approval of composition of election districts pursuant to section 5 of the Voting Rights Act did not require invalidation of prior elections); *Cipriano* v. *Houma*, 395 U.S. 701 (1969) (invalidation of Louisiana law permitting property owners alone to vote in election to approve the issuance of municipal utility revenue bonds did not compel invalidation of previous approval of $10 million in bonds in view of the "significant hardships" which would befall the cities, bondholders and other persons connected with the utilities if the bonds were invalidated); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970) (invalidation of $60,450,000 in general obligation bonds approved pursuant to an unconstitutional election process not required since bonds were issued on the "good faith assumption that restriction of the franchise in the bond election was not constitutionally prohibited [and because] it would be unjustifiably disruptive" to give the decision full retroactive effect.)

for certain secular educational services (*Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (*Lemon* I)) precluded the subsequent District Court order on remand permitting the State to reimburse nonpublic sectarian schools approximately $24 million owed for services provided during the 1970-1971 school year before issuance of the *Lemon* I decision.* Recognizing that where as in the present case an equitable solution was required, the Court determined that "reliance interests must weigh heavily in the shaping" of the appropriate equitable decree. In *Lemon* II the Court concluded that the plaintiffs' "tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments [in entering into new contracts] in reliance upon reimbursement by the State . . ." *Id.* at 204. Nor was such reliance undercut by the fact that the statute's validity had never been authoritatively determined. In soundly rejecting this proposition, the Chief Justice stated:

> Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is consti-

* The challenged law was enacted on June 19, 1968 and contracts with nonpublic schools were entered into in January 1969. Within one month of adoption of the legislation plaintiffs publicly announced their intention to file a lawsuit challenging its constitutionality. Simultaneously with the filing of their complaint on June 3, 1969 plaintiffs sought a preliminary injunction to restrain responsible state officials from paying or processing for payment any funds appropriated pursuant to the challenged legislation. This motion however was subsequently withdrawn by plaintiffs. Following the District Court's dismissal of the complaint and the Court's acceptance of their appeal, plaintiffs did not move for interlocutory relief pending appeal.

tutional. Appellants would have state officials stay their hands until newly enacted state programs are "ratified" by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers—the officers of Pennsylvania—have the power to carry forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review. We do not engage lightly in post hoc evaluation of such political judgment, founded as it is on "one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law." *San Antonio School District* v. *Rodriguez,* 411 U.S. at 60 (Stewart, J., concurring).

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In short, the propriety of the relief afforded appellants by the District Court, applying familiar equitable principles, must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful [*Id.* at 207-209].

In considering claims for recovery of taxes paid prior to invalidation of governing tax statutes, reviewing courts have followed or anticipated the *Lemon* II analysis in barring restitution of tax monies collected by governmental officials in good faith reliance upon the presumed validity of the tax enactments. Thus in *District of Columbia* v. *Keyes*, 362 A.2d 729 (D.C. Ct. App. 1976), the court denied a request that the District be required to refund all excess taxes for the 1973 fiscal year (variously estimated to be $1.1-1.75 million) collected pursuant to a statute declared unconstitutional in October, 1973. Given the significant monies involved (as compared to the District's annual $1 billion budget), the fact that the funds had already been expended for governmental purposes and that new taxes or decreased public services would be effected if the recovery was allowed, the Court concluded that equity had been done in the prior proceeding with the issuance of a mandatory injunction prohibiting the District's use of the invalidated assessment procedure for the 1974 fiscal year.

Similarly in *Hurd* v. *City of Buffalo*, 343 N.Y.S.2d 950 (Sup.Ct. App. Div. 1973) aff'd 355 N.Y.S.2d 369, 311 N.E. 2d at 504 (Ct. App. 1974), the New York courts refused to apply their decision as to the unconstitutionality of a tax statute retrospectively to allow for recovery of excess taxes. Finding the equitable considerations of reliance cited in *Lemon II* to be dispositive, the courts concluded that the City's reliance on its ability to collect the taxes pursuant to the statute in preparing its budget and its expenditure of these monies was a sound basis upon which to deny recovery of the "illegally collected" taxes.* See also *Heller-*

* In *Pellnat* v. *City of Buffalo*, 399 N.Y.S.2d 788, 790 (Sup. Ct. App. Div. 1977) the Court extended the *Hurd* decision to preclude recovery of taxes paid under protest after the *Hurd* trial court's

(Footnote continued on following page)

stein v. *Assessor*, 37 N.Y.2d 1, 14, 332 N.E.2d 279, 287 (Ct. App. 1975) mod. 39 N.Y.2d 920, 352 N.E.2d 593 (Ct. App. 1976) (decision invalidating illegal assessment practices of Town of Islip held to be prospective only with the effective date of the order deferred until July 1, 1978 in order to provide for reasonable time for reassessments; in dictum, the court opined that taxes levied and paid should not be recoverable). See also *Deltona Corp.* v. *Bailey*, 336 So. 2d 1163, 1166 (S.Ct. Fla. 1976) and *Interlachen Lakes Estates, Inc.* v. *Snyder*, 304 So.2d 433, 326-327 (S.Ct. Fla.

(Footnote continued from preceding page)

decision upholding the challenged statute had been reversed by the Appellate Division decision but before affirmance of the Appellate Division decision by the Court of Appeals, concluding that the City of Buffalo had the right to rely on the basic presumption of the constitutional validity of the law despite the Appellate Division determination since "there was no certainty as to the ultimate determination of the question . . . [and] practicality demanded that the governmental process go on." In the wake of subsequent efforts by the New York Legislature to re-enact statutes "indistinguishable from the Legislation struck down as unconstitutional in *Hurd supra*," the Court of Appeals however did allow for restitution of any taxes paid in protest by the taxpayers who initiated lawsuits to invalidate these enactments on the basis that its opinion in *Hurd* put local subdivisions on notice that "patent circumvention of constitutional limitations on their taxing powers would not be tolerated." *Bethlehem Steel Corp.* v. *Bd. of Ed.*, 402 N.Y.S.2d 655 (Sup. Ct. App. Div. 1978) aff'd and mod. 406 N.Y.S.2d 752, 755 (Ct. App. 1978). See also *Central Buffalo Project* v. *City of Buffalo*, 428 N.Y.S.2d 102 (Sup. Ct. App. Div. 1980) aff'd o.b. 438 N.Y.S.2d 79 (Ct. App. 1981). A similar state court ruling authorizing recovery of past taxes paid pursuant to the unconstitutional applications of the taxing laws was also predicated upon the implicit finding of unjustified or bad faith assessment. See *Florida Dept. of Revenue* v. *Ford*, 417 So.2d 1109 (D. Ct. App. Fla. 1982) (failure of State Department of Revenue to even attempt to undertake its statutory duty to supervise the assessment of valuation of property).

1973) (invalidation of statute establishing unconstitutional tax assessment valuation scheme prospective only from date opinion on rehearing issued); *Gulesian* v. *Dade County School Bd.*, 281 So.2d 325, 326-327 (S.Ct. Fla. 1973) (refund of $7.3 million in taxes illegally collected without elector approval denied); *Deseret & Ranches of Fla.* v. *St. Johns River Water Management District*, 406 So.2d 1132 (Dist. Ct. App. Fla. 1981) (refund of ad valorem taxes collected by an unconstitutionally created water management district denied). See also *Wilson* v. *School District of Philadelphia*, 328 Pa. 225, 195 A. 90, 100-101 (S.Ct. 1937) (taxes levied by Philadelphia school district pursuant to unconstitutional statutory provision not recoverable; as well, delinquent taxpayers could be assessed for taxes unpaid during the period prior to invalidation of the statute where school district had incurred expenses in reliance on such future payments).

In the wake of these rulings as well as its own earlier pronouncements, see e.g. *Borough of Neptune City* v. *Borough of Avon by the Sea*, 61 N.J. 296, 294 A.2d 47 (1972), *Darrow* v. *Hanover Tp.*, 58 N.J. 410, 412, 278 A.2d 200 (1971), *Goldberg* v. *Traver*, 52 N.J. 344, 245 A.2d 334 (1968) and *Switz* v. *Middletown Tp.*, 23 N.J. 580, 130 A.2d 15 (1957), it is evident that the Supreme Court of New Jersey, in framing the relief to be granted to petitioners herein, was not compelled by either the State or Federal Constitutions to invalidate retrospectively the State's collection of taxes during the 22 years in which the ETT legislation has been in effect. Rather, that court possessed "a large measure of . . . discretion . . . in deciding both the issues of prospective application or retrospective application and the time for which the new principle is to be deemed controlling." *State* v. *Vigliano*, 50 N.J. 51, 65-66, 232 A.2d 129 (1967) cited with approval in *Jenkins* v. *Delaware*, 395 U.S. 213, 218 (1969).

As recognized in *Lemon II, supra* at 200, 201

> . . . in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair and what is workable. . . . In equity, as nowhere else, courts [must] eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that these interests have constitutional roots.

Accordingly (and petitioners herein do not dispute this), in the exercise of its equitable discretion the Supreme Court of New Jersey properly considered and gave great weight in determining the appropriate form of relief to be afforded petitioners to such pragmatic and compelling factors as: the absence of any attempt by petitioners or other commuters to obtain interim injunctive relief during the pendency of this action "presumably because their right to relief was not clear. . . ." (App. A at 18a to 19a); the fact that petitioners have suffered no financial harm by operation of the ETT in that they have received full credit for the amounts paid to New Jersey against their New York income tax (App. A at 19a); and the fiscal chaos which would result if full refunds were compelled** (App. A at

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* The individual taxpayers accordingly have no entitlement in equity to obtain the monies sought and would reap only a windfall if the requested relief were granted. *See United States* v. *Jefferson Electric Co.*, 291 U.S. 386, 402-03 (1934).

** This Court, of course, in various contexts has recognized the substantial degree to which States rely on tax revenues and the "ominous . . . potential for havoc" that the enjoining of the State collection process and even temporary loss of tax revenues will effect. *See Fair Assessment in Real Estate Assoc., Inc.* v. *McNary*, 454 U.S. 100, 103 (1981); *Rosewall* v. *LaSalle National Bank*, 450 U.S. 503, 527, 528 (1981).

18a). Indeed, petitioners' sole basis for challenge is their claim that the court below erred in declining to rule that the ETT is indistinguishable from the tax invalidated in *Austin* v. *New Hampshire* and thus that New Jersey could not reasonably have concluded that the tax would ultimately be validated. The fallaciousness of this assertion is evident.

Of obvious and critical distinction are the trial court and the Supreme Court of New Jersey's findings of the unique demographic and commuter transportation problems experienced in the metropolitan New York-New Jersey area and the contributing factor the New York commuters play in increasing the need for substantial expenditures by the State of New Jersey for maintenance and subsidy of interstate transportation facilities. In response to these problems and in recognition of the absence of any contribution by New Yorkers to the inordinate costs incurred by New Jersey, the State of New Jersey, with the concurrence of the State of New York, as evidenced by the 1962 Accord concluded by Governors Rockefeller and Hughes, undertook to tax New York commuters alone under the ETT with the understanding that these New Yorkers would be afforded a credit for payment of these taxes against the New York tax, and with the further agreement that a reciprocal taxing arrangement would be established for the New Jersey traveler. In short, the ETT and the tax credit mechanisms of the two States became the mechanisms for achieving what both States perceived as an equitable apportionment of taxes levied on the total class (citizens of New Jersey and New York) of interstate commuters involved. In reliance on the terms of the Accord, and specifically, the agreement "that neither State would contest nor participate in contesting the right of the other to levy and collect the taxes imposed by the two laws on residents of the other . . ." (Cr. Pet. App. C at 67a), New Jersey

reasonably believed that a reciprocal arrangement to fairly allocate the financial burdens of government between the States had been achieved consistent with the limitations imposed by the Privileges and Immunities Clause.

The issuance of the *Austin* v. *New Hampshire* ruling did not and should not have dispelled the State's firm belief in the legitimacy of the ETT. Thus, rather than altering the principles governing challenges to State tax legislation under the Privileges and Immunities Clause of Article IV of the United States Constitution, the Court re-emphasized the fact that this Clause ". . . implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." *Id. at* 662. The Court also quoted with approval the statement in *Travelers' Insurance Co.* v. *Connecticut,* 185 U.S. 364 (1901) that to satisfy the requirements of the Clause it is "enough that the State has secured a reasonably fair distribution of burdens and that no intentional discrimination has been made against nonresidents." 420 U.S. at 664. However, the record in *Austin* was barren of any indication that the tax "secured a reasonably fair distribution of burdens." Moreover, there was no suggestion in the record that nonresidents imposed any special fiscal burden on the State nor that the proceeds from the taxes imposed on nonresidents were devoted to meeting that burden, as was the case in New Jersey. Most significantly, there was no indication that the invalidated tax had resulted from bilateral actions between sister states as with the New York-New Jersey accord. In fact, the Court specifically noted that:

> Neither *Travis* nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a dis-

> advantage upon nonresidents, not reciprocally favorable treatment of nonresidents by states that coordinate their tax laws [*Id.* at 667, n. 12].*

The State's good faith belief that the ETT would survive any constitutional challenge was confirmed by the initial trial court ruling that New York and New Jersey had entered into a reciprocal agreement, consistent with the principles of interstate comity embodied in the Privileges and Immunities Clause of Article IV, pursuant to which the States had sanctioned their respective Legislature's formulas for the taxation of residents and nonresidents. Although this ruling was ultimately vacated by the Supreme Court of New Jersey in its 1980 ruling, the State was successful in its contentions that the mere superficial similarity between the New Hampshire tax in-

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* In this regard petitioners blatantly misrepresent the legal arguments of the State of New Jersey in the *amicus curiae* brief filed in *Austin* v. *New Hampshire*. A review of the *entire* paragraph in the *amicus* brief from its beginning (not from the middle as in petitioners' brief), reveals the State's true position, i.e., only the collection of the two taxes from non-residents is similar—in all other respects the taxes *differ*:

> *The transportation taxes imposed by New Jersey thus differ from the New Hampshire income tax involved in the present matter since the revenues from the New Jersey taxes are used solely to alleviate transportation problems encountered by the interstate commuters while the New Hampshire tax revenues are not so dedicated.* Also, each of the New Jersey taxes has a uniform tax rate. Nevertheless, the New Jersey and New Hampshire taxes are similar insofar as the tax revenues are derived solely from nonresidents because each of the taxing statutes permit residents a credit for income taxes paid to the State wherein such persons work [*Amicus Curiae* brief of the Attorney General of New Jersey in *Austin* v. *New Hampshire*, page 3; emphasis added].

validated in *Austin* and the ETT would not justify automatic invalidation of the ETT without further inquiry as required by *Hicklin* v. *Orbeck* and *Toomer* v. *Witsell* as to the peculiar burden which New York commuters imposed on the New Jersey transportation network, the expenditures required by the New York commuters' use of the State's transportation system and the use of the proceeds from the ETT to meet those burdens. As well, the State prevailed in its arguments that the ETT legislation did not place an impermissible burden on New Yorkers' right to travel or otherwise violate the prohibitions of the Equal Protection Clause. These rulings, of course, were not placed in doubt when this Court on October 6, 1980, dismissed petitioners' appeal. That New Jersey reasonably persisted in its belief in the legitimacy of the ETT and in its entitlement to collect and utilize these monies was reaffirmed with the issuance of the trial court opinion on remand that the ETT did not violate the Privileges and Immunities Clause.*

Each of these affirmative preliminary rulings by the reviewing courts as well as the substantial arguments the State continues to press in its cross-petition for a writ of certiorari in this action obviously justified a conclusion

* The State's reliance upon the availability of ETT funds and its right to expend same for necessary transportation costs has equally been enforced by the absence of any challenge made to its constitutionality from 1962-1976, and thereafter by the *Salorio* and *Yowell* plaintiffs' tactical decisions not to seek interim injunctive suspension of the tax or creation of a fund in court in which the tax monies could be deposited during the pendency of these proceedings. As the *Lemon* II Court repeatedly emphasized, *id.* at 204-205, such a tactical choice may reasonably "encourage" the governmental or private body "to incur detriments in reliance upon" the availability of these monies.

by the court below which should be affirmed by this Court that the State has proceeded in good faith in its belief that the ETT is not "plainly unlawful." *Lemon II, supra* at 209.

Balanced against the substantial equitable factors militating in favor of prospective application of an adverse ruling—the devastating monetary exposure faced by the State, the State's good faith judgment as to the constitutionality of the ETT legislation and its reliance on and expenditure of the taxes collected—is the uncontroverted absence of any cognizable harm to the petitioners in this proceeding or to New York commuters generally. Moreover, because it is undisputed that this case is being totally financed by New York State and from the limited discovery permitted the State it appears that the litigation may also have been completely controlled by the State, there is no warrant for concern that denial of retrospective relief would deny to these petitioners a reward for their initiative in pursuing the litigation.* Compare e.g. *Ramirez* v. *Amsted Industries, Inc.*, 86 N.J. 332, 357, 431 A.2d 811 (1981); *Willis* v. *Dept. of Cons. & Ec. Dev.*, 55 N.J. 534, 541, 264 A.2d 34 (1970). Accordingly, under the clear guidelines articulated by the Court in *Lemon II*, the Supreme Court of New Jersey's denial of the requested refund of ETT was an eminently proper exercise of the broad discretionary powers afforded the State courts in fashioning equitable remedies. *Cf.* also *Los Angeles Dept. of Water and*

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* As noted in the cross petition these actions by New York are in violation of certain provisions of the Accord between the two States. New York, however, is not a named party to this litigation and no issue consequently is presented herein as to the enforceability of this part of the Accord or remedies available for its breach. Except as to its pledge not to "contest" the ETT, New York has otherwise abided by the terms of the Accord.

Power v. *Manhart*, 435 U.S. 702, 719-723 (1978). For these same reasons and in proper recognition of the burdensome task imposed upon the New Jersey Legislature to establish an alternative scheme of taxation to replace the millions of dollars of tax revenue to be lost with the invalidation of the ETT and the evidence establishing the validity of approximately 50% of the ETT rate, the Supreme Court of New Jersey properly postponed the effective date of its decision until January 1, 1984. See *Northern Pipeline Co.* v. *Marathon Pipeline*, —— U.S. —— (1982) and —— U.S. —— (1982); *Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976).

The determinations of the Supreme Court of New Jersey challenged herein therefore reaffirm this Court's and Congress' confidence in the competency of the State judiciary to adjudicate and safeguard federal constitutional rights. *Dist. Col. Court of Appeals* v. *Feldman*, —— U.S. ——, n. 16 (1983); *Calif.* v. *Grace Brethren Church*, —— U.S. —— (1983); *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, —— U.S. —— (1982). In strict adherence to the Court's rulings on factors to be weighed in determining the retrospectivity of constitutional adjudications affecting the public fisc, the court below balanced the relative harm to the State, innocent third parties and the individual claimants and evaluated the reasonableness of the State's conviction that invalidation of the ETT was not "clearly foreshadowed" by the *Austin* ruling. See *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971). Petitioners' protestations to the contrary as to this latter point ignores the critical distinctions between the two taxes established by the evidence adduced below, but of equal importance fails to take cognizance of the Court's admonitions that in litigation involving issues respecting the constitutionality of state taxes "opinions must be read in the setting of the particular cases and as the product of preoccupation with

their special facts." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946).

The petition for writ of certiorari plainly does not present any question of constitutional dimension nor any other basis which would warrant the granting of such extraordinary relief. The petition should therefore be denied.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: October 6, 1983

Respectfully submitted,

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